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IN THE
Supreme Court of the United States

CRV ENTERPRISES, INC. AND C. RYAN VOORHEES,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE CATO INSTITUTE, REASON FOUNDATION, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Takings Clause have an expiration date?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The Federal Circuit decided that CRV Enterprises lacked standing to challenge an Environmental Protection Agency (EPA) decision restricting access to its property as a regulatory taking because CRV purchased the property after the EPA issued that decision. *CRV Enters. v. United States*, 626 F.3d 1241, 1250 (Fed. Cir. 2010). The Federal Circuit's decision amounts to a *per se* bar to regulatory takings claims by plaintiffs who take title to property after a regulation is enacted. This decision cannot be reconciled with *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), which held that a Fifth Amendment Takings Clause claim cannot be barred simply because the property owner took title after the challenged regulation was enacted.

In *Palazzolo*, the Supreme Court explained the fundamental principle that "a regulation that otherwise would be unconstitutional absent compensation is not transformed [into one that is constitutional] by mere virtue of the passage of title." *Palazzolo*, 533 U.S. at 629. The Supreme Court rejected the idea that "the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no entity or person, aside from the *amici curiae*, its members, and its counsel, made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici* certify that counsel of record for both parties received timely notice of our intent to file this brief, and have consented to its filing.

extreme or unreasonable" because such a rule would "put an expiration date on the Takings Clause." *Id.* at 627. Here, the Federal Circuit abrogated *Palazzolo* because it barred CRV's action by enforcing just such an expiration date.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato publishes the annual *Cato Supreme Court Review* and files *amicus curiae* briefs with the courts. This case is of central concern to Cato because it implicates Fifth Amendment protections from regulatory takings and is a departure from foundational Supreme Court decisions protecting those rights.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports that promote choice, competition, and a dynamic market economy as the foundation for human dignity and progress. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television, and Reason personnel consult with public officials at the national, state, and local level on public policy issues. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as

amicus curiae in cases that raise significant constitutional issues involving property rights.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose mission is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition expressed in the Fifth Amendment that private property can be taken only for public use, and then only upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as *amicus curiae* before this Court in several cases of constitutional significance, including *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Rapanos v. United States*, 547 U.S. 715 (2006).

The National Federation of Independent Business is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents over 300,000 businesses, and its membership ranges from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest. The NFIB Legal Center frequently files *amicus* briefs in cases that impact small businesses.

STATEMENT OF THE CASE

This case centers on a parcel of land adjacent to a narrow strip of navigable water—a "slough"—in the Central Valley city of Stockton, California. The slough is connected to a waterway that eventually leads to the San Francisco Bay. As with any waterfront property, ownership of the parcel adjacent to the slough includes the right to access the water. California courts have long recognized that a littoral owner's access to the shore adjacent to his property is a property right. *Marks v. Whitney*, 6 Cal. 3d 251, 262-63 (1971) (citing *S.F. Sav. Union v. R. G. R. Petroleum Co.*, 144 Cal. 134 (1904); *Yates v. Milwaukee*, 77 U.S. 497 (1871)). The facts that follow provide the context for the EPA's taking of that property right from CRV.

From 1942 to 1990, before either party to this suit was involved, a wood-preserving plant operated on the slough's southern shore. The plant released chemicals, some of which settled at the bottom of the slough. Due in part to these sediments, in 1992 the EPA added the former plant site and the sediment to its Superfund National Priorities List. *CRV Enters.*, 626 at 1243-44.

After studying the site and issuing some draft reports, the EPA issued a final ruling, a Record of Decision ("ROD"), in 1999. The ROD provided for capping the slough and restricting access to it. In 2000, after the EPA issued its ROD, CRV began discussions with the owner of a parcel across the slough from the site once occupied by the wood-preserving plant. CRV hoped to develop that parcel and others it already controlled into a mixed use development including a marina, boat slips,

restaurants, lodging, storage, sales, and service facilities. CRV knew of the ROD when it was considering its purchase. In 2002, CRV finalized its purchase of the property, including the littoral rights that were necessary for CRV's planned development. *Id.* at 1244-45.

In 2003, CRV filed an inverse condemnation claim against the United States, arguing that the EPA's planned remediation was a taking. Because no work had been done on the remediation, the parties agreed to dismiss without prejudice for lack of ripeness. *Id.* at 1245.

In 2006, the EPA installed a sand cap and log boom obstructing CRV's access to the slough and posted signs including "NO ENTRY." *Id.* at 1245. Shortly thereafter, CRV sued the United States in the Court of Federal Claims, arguing that these measures denied CRV's access to the shoreline adjacent to its property and therefore constituted a taking of its littoral rights. That court dismissed the claim for various reasons, including that CRV lacked standing because it did not own the property at the time the ROD was issued. *Id.* at 1245; *CRV Enters. v. United States*, 86 Fed. Cl. 758 (2009). CRV appealed that ruling, and the Federal Circuit affirmed, in part based on the conclusion that CRV lacked standing. The Federal Circuit explained that any regulatory takings claim was owned by the prior owner and such a claim brought by CRV "is barred because [CRV] did not own a valid property interest at the time of the alleged regulatory taking." *CRV Enters.*, 626 F.3d at 1250.

REASON FOR GRANTING THE PETITION

The Federal Circuit faced an important question of law and issued a ruling that conflicts with this Court's jurisprudence and with the decisions of other federal courts. *CRV Enterprises* and the Ninth Circuit's recent ruling in *Guggenheim* exacerbate a growing circuit split and departure from this Court's precedent. This Court should provide much-needed doctrinal certainty by reaffirming *Palazzolo*.

Here, the Federal Circuit's ruling as to CRV's regulatory takings claim—that a party that took title after a regulation was enacted has no standing to challenge that regulation—directly contravenes this Court's holding in *Palazzolo*. It also implicates the question that *Palazzolo* answered in the negative: Does the Takings Clause have an expiration date?

In *Guggenheim v. City of Goleta*, No. 06-56306, 2010 U.S. App. LEXIS 25981 (9th Cir. Dec. 22, 2010), the *en banc* Ninth Circuit decided that a property owner could not prevail on his regulatory takings claim because he had purchased the property after the regulation in question was enacted. *Guggenheim* also has a pending Petition for Writ of Certiorari, *Guggenheim v. City of Goleta*, 2010 U.S. App. LEXIS 25981 (9th Cir. 2010), *petition for cert. filed* (U.S. Mar. 14, 2011) (No. 10-1125), which *amici* also supported in separate briefs.

ARGUMENT

I. THE FEDERAL CIRCUIT RULING SIGNIFICANTLY DIMINISHES PRIVATE PROPERTY RIGHTS.

This case presents several important issues. The Court should consider the following: (1) when post-enactment purchasers are *per se* denied standing to challenge regulation, government power expands at the expense of private property rights; (2) a rule under which pre-enactment owners have superior rights to subsequent title-holders threatens to disrupt real estate markets; (3) the Federal Circuit's decision in *CRV Enterprises* abrogates the Supreme Court's decision in *Palazzolo*; and (4) this case—as well as *Guggenheim*—indicates the need for the Supreme Court to settle spreading confusion about *Palazzolo*. We begin by explaining why the Court should underscore its disapproval of a rule that would deny subsequent owners their fundamental right to challenge government interference with their property.

A. The Federal Circuit Placed an Expiration Date on the Takings Clause: the Date Title Changes Hands.

The Fifth Amendment mandates that government take property only for public use and that the affected property owner receive just compensation. U.S. CONST. AMEND. V; *Kelo*, 545 U.S. at 477. Courts rarely side with property owners when government exercises eminent domain—"the despotic power"—therefore it is all the more important that owners be properly compensated. *See generally Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 311 (1795); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S.

104 (1978); *Tahoe-Sierra Pres. Council v. Tahoe Reg. Planning Agency*, 535 U.S. 302, 335-36 (2002).

The most direct taking occurs when government transfers ownership of land from one party to another—either to the government or to a private party who will use the land for a legitimate public purpose. *See, e.g., Kelo*, 545 U.S. at 478. Physical takings involve either the physical occupation or destruction of the property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

But the government takes private property in less direct ways as well: government regulation may foreclose certain uses of land and thereby diminish its value. When property suffers under the weight of particularly burdensome regulation, the Takings Clause allows a landowner to challenge the government even though it has not physically occupied or destroyed his property. Under this Court's regulatory takings jurisprudence, the government has been required to recompense property owners for the diminution in property value caused by regulation "so unreasonable or onerous as to compel compensation." *Palazzolo*, 533 U.S. at 627; *see also, e.g., Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1027 (1992) ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) ("Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So

long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (compensable taking can occur not only when the government seizes or physically intrudes on land, but also when it enacts a "regulation [that] goes too far" in diminishing its value); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179 (1872) ("There are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken.").

This Court has refused to accept the view that those who purchase property after a regulation is enacted are, in effect, "on notice" and should be ineligible for compensation. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. at 860 (Brennan, J., dissenting). Instead, faced with a claim from a property owner who purchased land already subject to strict California coastal land use laws, the Court held that just as such a regulation could be challenged by owners at the time of implementation, later owners may also challenge it and be compensated. *Id.* at 833 n.2. The Court has made clear that prior owners' full property rights—including the right to challenge an overly burdensome regulation—transfer with title to the property. *Id. See also Palazzolo*, 533 U.S. at 628 ("It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.").

In *Palazzolo*, this Court explicitly rejected the rule that appellants like CRV—those who purchased property already subject to a regulation—could *per se* have no investment-backed expectations beyond what was allowed by the regulation, no matter how burdensome. This Court further explained that such a rule:

> would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Palazzolo, 533 U.S. at 627.

The Federal Circuit considered this Court's precedent when coming to its decision; indeed it cited *Palazzolo*. *CRV Enters.*, 626 F.3d at 1249 (citing *Palazzolo*, 533 U.S. at 610) ("The Supreme Court has held that a takings claim does not accrue when Congress enacts an overall statutory scheme that authorizes government action; instead the claim ripens when particular restrictions are actually imposed."). The court explained that under *Palazzolo*, CRV's regulatory takings claim ripened with the issuance of the ROD in March 1999, before CRV purchased the property. The Federal Circuit then continued with no additional citations, to the following conclusion:

> As such, the claim was ripe when the ROD was issued in March 1999. CRV did not enter into its option agreement with Dutra until August 2000, and it did not exercise its option to purchase the property until November 2002.

> Because the claim accrued and ripened before plaintiffs acquired the property, plaintiffs cannot state a regulatory takings claim. That claim, if it existed, was owned by the prior owner.
>
> We conclude that plaintiffs did not state a valid physical takings claim, and, to the extent they allege a regulatory takings claim, that claim is barred because plaintiffs did not own a valid property interests at the time of the alleged regulatory taking.

CRV Enters., 626 F.3d at 1250.

This holding—that a post-enactment purchaser does not have standing to challenge a regulation—directly contravenes *Palazzolo*, threatens fundamental rights, and demands reexamination.

B. The Federal Circuit Decision Threatens to Disrupt Real Estate Markets Because Transactions Would Extinguish the Right to a Takings Clause Challenge.

A rule that diminishes property rights as property changes hands could disrupt real estate markets by restricting alienation and interfering with transactions. If one property owner may defend his property against regulations enacted during his ownership, his property value will include the assumption that if an overly burdensome regulation is enacted, he may successfully challenge that enactment and either overturn it or be compensated for the extent to which it diminishes his property value. But the Federal Circuit's rule casts doubt on all of this once he considers selling the property. As a buyer evaluates her potential purchase of the property, she must look at any regulation, no matter

how burdensome, and assume that if she takes title, she cannot challenge it. The loss of standing to challenge diminishes her estimate of the property's value. If the owner has a higher subjective value of the property than any potential buyer could have—the logical result of the Federal Circuit's rule—that mismatch could interfere with the free exchange of real property.

Briefs from *Palazzolo* made these same arguments in 2001. *Amici* for the petitioner in that case explained that small business owners would suffer in a legal regime without *Palazzolo*, but large developers with "high-powered legal counsel" would not, as they "might have arranged for the pre-enactment owner to retain legal ownership of the property and act as a figurehead by applying for all permits under his own name until after the property had been completely developed." Brief for W. Frederick Williams, III, and Louise A. Williams on the Merits in Support of Petitioner at 9, *Palazzolo v. Rhode Island ex rel.*, 533 U.S. 606 (2001) (No. 99-2047). The "post-enactment purchaser" theory would invite litigation over the "form of the transaction, the nature of the transfers, and the effect of partial transfers" in that sophisticated buyers and sellers could circumvent the rule through, for example, acquisition by stock purchase. *Id.* at 10.

Individuals and small companies would not have the resources or expertise to protect their investment and development rights, creating a "massive uncompensated taking" from small developers and investors while leaving open sufficient loopholes for large corporations to avoid any ill effects. *Id.* Such a rule would not only lead to litigation, but would stimulate undesirable growth patterns such as

"sprawl" and "premature" or "leapfrogged development." *Id.* at 15, 19. It would also restrain alienation by giving owners a disincentive to sell: a seller unwilling to secure development rights would have to sell at a "stern discount" to cover the purchaser's loss of rights. *Id.* at 13-14.

An additional *amicus* brief supporting the petitioner in *Palazzolo*—by the Institute for Justice and Professor Richard Epstein—underscores this last point, explaining that the "disregard from the privity rule creates weird incentives that disrupt the sound operation of the real estate market" because if the buyer and seller are aware of the legal situation, "they may postpone an otherwise beneficial transfer in order to protect [the seller's ability to perfect title]," at a social loss presuming the buyer values the land over the seller. Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 7 n.2, *Palazzolo v. Rhode Island ex rel.*, 533 U.S. 606 (2001) (No. 99-2047).

Buyers may forgo a socially beneficial transaction for fear that the land will become worthless upon transfer of title. Thus, valuable voluntary transactions will be discouraged by an "unsound rule that against all reason treats a sale from X to Y as though it were a gift of X's takings claim to the state." *Id.* at 8. Such a rule will instead lead to idle and unproductive uses of land. Finally, the Institute for Justice and Prof. Epstein point to what they call a "knowledge problem": the buyer has "the best information on the adverse effects that the regulation has on his proposed plans for development," but this rule allocates the takings claim to the seller and former owner who has "no knowledge of the particulars of the dispute, no ongoing interest in the

property, and who may not even be alive or in the jurisdiction at the time that the dispute ripens." *Id.* at 10. Their brief emphasizes that the rule would disrupt real estate markets and invite a "torrent of lawsuits . . . ." *Id.* at 16.

The negative effects of the decision below on the real estate market and transaction-related litigation could be considerable.

II. THE FEDERAL CIRCUIT MISAPPLIED *PALAZZOLO* AND DEEPENED A CIRCUIT SPLIT

A. The Federal Circuit (Like the Ninth Circuit in Another Case Pending Before this Court) Abrogated *Palazzolo*.

This Court has definitively rejected the rule—sometimes called the "notice rule"—that a successive title-holder is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking. *Palazzolo*, 533 U.S. at 626; Breemer, J. David & Radford, R.S., *The (Less) Murky Doctrine of Investment-Backed Expectations After* Palazzolo *and* Tahoe-Sierra *and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-*Palazzolo *Muck*, 34 Sw. U. L. Rev. 351, 382 (2005) (recognizing that *Palazzolo* rejected the "notice rule" and confirmed that a purchaser of land acquires all of the rights owned by her predecessor in interest).

This Court explained its holding in *Palazzolo* in sweeping language, which should have left lower courts with no doubt about the state of the law:

> The theory underlying the argument that postenactment purchasers cannot challenge a

> regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 627 (internal citations omitted).

Though decidedly more measured, Justice O'Connor wrote separately and also declined to give timing dispositive status:

> Today's holding does not mean that the timing of the regulation's enactment relative to the

> acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance . . . . [I]nterference with investment-backed expectations is one of a number of factors that a court must examine.

Palazzolo, 533 U.S. at 633 (O'Connor, J., concurring).

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court reiterated its rejection of a rule under which a post-enactment purchaser's notice of a regulation would be a *per se* bar to his claim:

> More importantly, for reasons set out at some length by Justice O'Connor in her concurring opinion in *Palazzolo v. Rhode Island*, we are persuaded that the better approach to claims that a regulation has effected a temporary taking 'requires careful examination and weighing of all the relevant circumstances.' . . . Justice O'Connor specifically considered the role that the 'temporal relationship between regulatory enactment and title acquisition' should play in the analysis of a takings claim.

Tahoe-Sierra, 535 U.S. at 335-36.

But despite this Court's clarity in *Palazzolo*, the Federal Circuit here—like the Ninth Circuit in *Guggenheim*, 2010 U.S. App. LEXIS 25981—abrogated the rule of that case and announced holdings that more closely resemble the Rhode Island Supreme Court decision that *Palazzolo* overturned. *Palazzolo v. State*, 746 A.2d 707, 716-17 (R.I. 2000) ("[In 1978], there were already regulations in place limiting Palazzolo's ability to fill the wetlands for

development. In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision . . . Palazzolo's lack of reasonable investment-backed expectations is dispositive in this case.").

Such a decision so significantly limits *Palazzolo*'s reach as to revert back to the pre-*Palazzolo* uncertainty regarding whether a post-enactment purchaser may challenge a regulation burdening his property. Both the *Palazzolo* majority and Justice Sandra Day O'Connor's concurrence were clear that notice of the regulation cannot be sufficient to defeat a takings claim. *See* John A. Kupiec, *Note: Returning to the Principles of "Fairness and Justice": The Role of Investment-Backed Expectations in Total Regulatory Takings Claims*, 49 B.C. L. REV. 865, 886 (2008) (explaining that in *Palazzolo*, the Supreme Court rejected the idea that notice of a regulation can alone be fatal to a takings claim and noting that Justice O'Connor's concurrence suggests that although the Court will not deny compensation solely on notice, it will consider the prior existence of a regulation when conducting the factual inquiry into the regulation's inherent fairness and the plaintiff's expectations); *Palazzolo*, 533 U.S. at 634-36 (O'Connor, J., concurring) ("Investment-backed expectations, though important, are not talismanic under *Penn Central* . . . . Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any 'set formula.'"). *Palazzolo* put to rest "once and for all the notion that title to property is altered when it changes hands." James S. Burling, *Private Property*

Rights and the Environment after Palazzolo, 30 B.C. ENVTL. AFF. L. REV. 1 (2002). This Court should not let the Federal Circuit (and the Ninth Circuit) disturb that finality.

B. Other Lower Courts Have Recognized and Applied *Palazzolo*.

In addition to the cases and courts discussed by the Petitioners, at least four other lower court cases from the past decade faithfully applied *Palazzolo*.

The First Circuit positively cited *Palazzolo* in a trade secrets claim for the premise that under *Penn Central*, "whether property is acquired before or after a regulation is enacted does not completely determine the owner's reasonable investment-backed expectations." *Phillip Morris v. Reilly*, 312 F.3d 24, 37 (1st Cir. 2002).

The Seventh Circuit expressed support for *Palazzolo*'s rule in *Abbott Laboratories v. CVS Pharmacy, Inc.*, 290 F.3d 854, 860 (7th Cir. 2002), citing *Palazzolo* for the proposition that "a takings claim survives transfer of the property to a new owner." Indeed in *Abbott Laboratories*, Judge Frank Easterbrook expressed confusion as to why this rule was not self-evident. *Id.*

The Eastern District of Missouri recognized *Palazzolo*'s rule in *Rucci v. City of Eureka*, 231 F. Supp. 2d 954, 957 (E.D. Mo. 2002). The *Rucci* court considered whether a takings claim failed because plaintiff knew of certain city zoning restrictions at the time he contracted to purpose the property. *Id.* The court recited key language from *Palazzolo*, that "acquisition of title to land after the effective date of state restrictions on the use of the land is not fatal to a regulatory takings claim by the new owner." *Id.*

(citing *Palazzolo*, 533 U.S. at 627-28). It thus denied the Defendant's motion for summary judgment and set the case for a jury trial to determine whether the city ordinance amounted to a regulatory taking. *Id.*

The Southern District of Indiana also invoked *Palazzolo*, citing it for the proposition that "legislation restricting the owner's use of the land could still impose a taking of after-acquired property if the restriction is unreasonable." *Martin Marietta Materials, Inc., v. Brainard,* No. 1:06-cv-0825-DFH-TAB, 2007 U.S. Dist. LEXIS 88922, at *38 (S.D. Ind. Nov. 28, 2007).

These cases unambiguously hold that *Palazzolo* forecloses the "post-enactment" theory.

* * *

Although the Federal Circuit cited *Palazzolo*, its decision abrogates that precedent. The same can be said of the Ninth Circuit's decision in *Guggenheim*. In both these recent cases, courts of appeals reached decisions irreconcilable with this Court's jurisprudence and in conflict with other lower courts.

CONCLUSION

This Court should grant *certiorari* to settle the apparent confusion about *Palazzolo* and reaffirm that the Takings Clause does not expire when title to property transfers.

Respectfully submitted,

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